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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
) ET Docket No. 97-99
Amendment of the Commission's Rules)
To Relocate the Digital Electronic Message)
Service From the 18 GHz Band to the) **DOCKET FILE COPY ORIGINAL**
24 GHz Band and To Allocate the)
24 GHz Band for Fixed Service)

MILLIMETER WAVE CARRIER ASSOCIATION, INC.
REPLY TO JOINT CONSOLIDATED OPPOSITION

The Millimeter Wave Carrier Association, Inc. ("MWCA"), by its attorneys, herewith replies to the Joint Consolidated Opposition to Petitions for Reconsideration and Applications for Review filed by Digital Services Corporation, Microwave Services, Inc., and Teligent, L.L.C. (collectively, "Teligent").¹ Despite overwhelming—and mounting—evidence of legal, procedural, and policy irregularities with the *Relocation Order* and the subsequent *Licensing Order*,² Teligent steadfastly maintains that its windfall gain of spectrum in the 24 GHz band is

¹ Joint Consolidated Opposition To Petitions For Reconsideration And Applications For Review To June 24, 1997 DEMS License Modification Order, ET Docket No. 97-99 (filed August 7, 1997) ("Joint Opposition"). The Joint Opposition was filed in response to petitions for reconsideration in ET Docket No. 97-99 filed by BellSouth Corporation and DirecTV and applications for review filed by MWCA and WebCel Communications, Inc. See Petition for Reconsideration of BellSouth Corporation (filed July 18, 1997); Petition for Reconsideration of DirecTV, Inc. (filed July 23, 1997); Application for Review of the Millimeter Wave Carrier Association, Inc. (filed July 23, 1997) ("MWCA Application"); Application for Review of WebCel Communications, Inc. (filed July 23, 1997).

² Amendment of the Commission's Rules To Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and To Allocate the 24 GHz Band for Fixed Service, Report and Order, 12 FCC Rcd 3471 (1997) ("*Relocation Order*"); Order, DA 97-1285 (June 24, 1997) ("*Licensing Order*"). MWCA has also petitioned for reconsideration of the *Relocation Order* and, inasmuch as many of the issues implicated are identical, hereby incorporates by reference herein its filings on the *Relocation Order*.

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not only proper, but also should be shielded from any public scrutiny. As discussed below, for legal, policy, and equitable reasons, the Commission should immediately rescind the *Licensing Order* and initiate, consistent with the Administrative Procedures Act (“APA”), a proceeding to examine allocation and licensing of spectrum in the 24 GHz band.

In its Application for Review, MWCA observed that the *Licensing Order* was unlawful because the actions taken perpetuate decisions in the *Relocation Order* adopted without proper notice and comment. Specifically, MWCA observed that *Bendix Aviation Corp. v. FCC*³—the principal case relied upon by Teligent—provided an example of a prior relocation using the military exemption to the APA where the Commission followed the proper procedural course by issuing a notice of proposed rulemaking before allocating or licensing replacement spectrum for licensees displaced to accommodate military needs. In response, Teligent’s sole argument is that in *Bendix*, and unlike in the present case, “the government had *no immediate need* to use the new spectrum for which it had sought a Commission reallocation.”⁴

Not only does Teligent’s “counter argument” miss the mark factually with respect to the *Bendix* case,⁵ Teligent’s opposition does not even attempt to address MWCA’s fundamental point that in the DEMS relocation no emergency warranted expedited action.⁶ Indeed, the rights

³ 272 F.2d 533 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. U.S.*, 361 U.S. 965 (1960) (“*Bendix*”)

⁴ Consolidated Opposition at ii (emphasis in original).

⁵ See *April Order*, 17 Rad. Reg. (P & F) at 1507 (finding that “if these vital defense needs are to be satisfied, sound frequency management requires that the designation in the Table of Allocations . . . *must be changed at this time*”) (emphasis added); *July Order*, 17 Rad. Reg. (P & F) at 1591 (noting that “[t]he action taken . . . was designed to satisfy the needs of the Government . . . in the performance of defense functions held vital to the security of the nation [and that] [t]he need was *urgent*.”) (emphasis added); *Bendix*, 272 F.2d at 536.

⁶ MWCA Application at 16-18.

of 18 GHz licensees are not to be terminated, except in two places, until January 1, 2001. Even in the two areas where relocation was more expedited, the Commission easily could have held a rulemaking, because licensees' rights were not terminated until one and one-half years after the military first asserted an interest in the band and five months after a possible relocation to the 24 GHz band was suggested in an *ex parte* memorandum to the Commission.

Teligent again also attempts to distinguish *Independent National Guard Association of Nevada v. O'Leary*,⁷ the principal case setting limits on agency's authority under the military exemption to the APA. In essence, Teligent argues that the military exemption is some talismanic shield sufficient to justify any action of the Commission, *except* the most obvious—terminating the “rights” of licensees in the 18 GHz band.⁸ Yet, that is precisely what the Commission did in the orders leading to the *Bendix* appeal. The *Bendix* appeal resulted from ARINC's opposition to its members having been forced out of the 8.5-9.0 GHz band to accommodate military needs. And, while spectrum in the 13 GHz band was allocated to address the needs previously served by the 8.5-9.0 GHz band, nowhere do any of the orders show any evidence of any attempt to grant then-existing 8.5-9.0 GHz users any form of *quid pro quo* or “equivalent” licenses in the 13 GHz band without a rulemaking evaluating reasonableness. Because the 24 GHz decisions in the *Relocation Order* were thus entirely severable from actions taken to protect military use of the 18 GHz band, *Independent Guard* plainly demonstrates that public notice and comment was a prerequisite to a procedurally adequate 24 GHz decision.

⁷ 57 F.3d 766 (9th Cir. 1995) (“*Independent Guard*”)

⁸ Teligent makes the baseless argument that, notwithstanding the rulemaking authority of the Commission and the explicit waivers on every radio license issued by the Commission, it has a constitutionally protected right to operate once granted a license. See Consolidated Opposition at 8-9; *but see* MWCA Reply to Oppositions, ET Docket No. 97-99 (filed July 23, 1997) at 12-13.

As a last resort, Teligent attempts to foreclose public scrutiny of the 24 GHz decisions by arguing that petitioners and applicants are seeking untimely relief or lack standing to pursue the *Licensing Order*. As a preliminary matter, it is inconceivable for Teligent to claim in good faith that requests to freeze the effectiveness of the *Licensing Order* should be procedurally denied as untimely requests for stay of a decision where petitioners had no right to participate in the decision.⁹ Given the gravity of the legal, policy, and technical issues raised in the petitions for reconsideration of the *Relocation Order*—and a request specifically asking the Commission to defer issuance of the license modifications—MWCA reasonably believed that sound policy would dictate resolving the legal issues before allowing Teligent to move forward with deployment in the 24 GHz band. Yet, before the pleading cycle was even complete on the petitions for reconsideration of the *Relocation Order*, the *Licensing Order* was issued, effective immediately. Inasmuch as the license modifications institutionalize the decisions challenged on reconsideration, the issuance of the license modifications does appear to constitute effective denial of reconsideration.

MWCA also has standing to challenge the *Licensing Order*. MWCA members, as previously noted, would have bid for the right to use the 24 GHz spectrum given away to Teligent, but were never afforded an opportunity to participate below, much less to file applications for the spectrum. The license modifications, as noted in the MWCA Application, also provide Teligent with an illegitimate headstart over its competitors and other economic benefits that constitute injury in fact to MWCA's members. Because MWCA's members


⁹ Not only were petitioners and applicants not given notice to file comments prior to the decision, an opportunity to oppose the license modifications was only afforded to incumbent licensees in the band.

therefore have standing to challenge the order,¹⁰ and because the purpose of the review is consistent with MWCA's charter, MWCA itself has standing to file an Application for Review under the associational standing test used by the courts.¹¹

For the foregoing reasons, MWCA respectfully urges the Commission to rescind the license modifications issued in the *Licensing Order*. These decisions were premised on an unlawfully adopted order and therefore perpetuate illegitimate actions to the detriment of the public interest. A new proceeding should be issued consistent with APA procedures to examine use of the 24 GHz band.

Respectfully submitted,

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¹⁰ As MWCA has previously noted, a member has standing to sue if it could demonstrate "actual or imminent" "injury-in-fact" that is "fairly traceable" to the challenged decision and "likely" to be "redressed by a favorable decision." See, e.g., *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315-16 (1995) (holding that cellular service providers' inability to file applications to compete for larger, more profitable areas due to a change in FCC rules constitutes actual economic injury sufficient to establish "injury-in-fact"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (one "likely to be financially injured" by agency action has standing to challenge that action). Specifically, the inability to file applications to compete in providing DEMS constitutes actual economic injury sufficient to establish "injury-in-fact." See, e.g., *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397, 403 & n.13 (1987) (recognizing that alteration of competitive conditions has probable economic impact which satisfies the "injury-in-fact" test). Moreover, MWCA members are competitors of Teligent, and Commission actions that increase the spectrum available to a competitor also establish "injury-in-fact." All of these injuries are traceable to the *Relocation Order*, and they are redressible by the Commission.

¹¹ *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

CERTIFICATE OF SERVICE

I, Semoyne Arana, hereby certify that on this 19th day of August, 1997, I caused copies of the foregoing "Reply of the Millimeter Wave Carrier Association, Inc." to be served, by First Class Mail, postage pre-paid, on the following:

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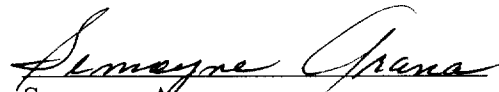
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